

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

United States Court of Appeals  
Fifth Circuit

**FILED**

June 15, 2009

\_\_\_\_\_  
No. 07-40225  
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Charles R. Fulbruge III  
Clerk

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

ARMANDO ARMENDARIZ-MORENO, also known as Armando Moreno-Ortiz

Defendant - Appellant

\_\_\_\_\_  
Appeal from the United States District Court  
for the Southern District of Texas  
USDC No. 1:06-CR-1029-ALL  
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Before REAVLEY, BARKSDALE, and GARZA, Circuit Judges.

ON REMAND FROM THE SUPREME COURT

PER CURIAM:

On December 12, 2007 this court affirmed the sentence of Armando Armendariz-Moreno (Armendariz) and rejected the objection to the 8 level enhancement of his offense level because of his prior conviction of unauthorized use of a motor vehicle in violation of Texas Penal Code § 31.07(a). As Armendariz conceded, the judgment was foreclosed by previous rulings of this circuit. See United States v. Galvan-Rodriguez, 169 F.3d 217 (5<sup>th</sup> Cir. 1999).

The Supreme Court has now granted certiorari and remanded for consideration in the light of Begay v. United States, 128 S.Ct. 1581 (2008) and Chambers v. United States, 129 S.Ct. 687 (2009). Those opinions hold that the generic crime of violence or aggravated felony must itself involve purposeful, violent and aggressive conduct. The risk of physical force may exist where the defendant commits the offense of unauthorized use of a vehicle, but the crime itself has no essential element of violent and aggressive conduct.

It follows that the Armendariz sentence rests on a procedural error. The government agrees that the sentence must be vacated and the case remanded for resentencing.

Sentence Vacated. Case Remanded.

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December 12, 2007

Charles R. Fulbruge III  
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No. 07-40225

Conference Calendar

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UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

ARMANDO ARMENDARIZ-MORENO, also known as Armando Moreno-Ortiz

Defendant-Appellant

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Before REAVLEY, BARKSDALE, and GARZA, Circuit Judges.

PER CURIAM:\*

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\* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Armando Armendariz-Moreno (Armendariz) pleaded guilty to illegal reentry after deportation and after having been convicted of an aggravated felony.

On appeal, Armendariz challenges the district court's characterization of his prior Texas conviction of unauthorized use of a motor vehicle as an aggravated felony for sentencing purposes. Armendariz concedes that this issue is foreclosed, but he nevertheless seeks to preserve it for Supreme Court review in light of the Supreme Court's decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004). As Armendariz concedes, this issue is foreclosed. *See Brieva-Perez v. Gonzales*, 482 F.3d 356, 360-61 (5th Cir. 2007); *United States v. Galvan-Rodriguez*, 169 F.3d 217, 219-20 (5th Cir. 1999).

In light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), Armendariz also challenges the constitutionality of 8 U.S.C. § 1326(b)'s treatment of prior felony and aggravated felony convictions as sentencing factors rather than elements of the offense that must be found by a jury. This court has held that this issue is "fully foreclosed from further debate." *United States v. Pineda-Arellano*, 492 F.3d 624, 625 (5th Cir. 2007), *petition for cert. filed* (Aug. 28, 2007) (No. 07-6202).

AFFIRMED.